

IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
MUSSELSHELL RIVER BELOW ROUNDUP BASIN (40C)
PRELIMINARY DECREE

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CLAIMANT: Kite Cattle Co.

CASE 40C-0238-R-2022

40C 186957-00

40C 209622-00

40C 209633-00

40C 210345-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

Water Right Claims 40C 186957-00, 40C 209622-00, 40C 209633-00, and 40C 210345-00 appeared in the Preliminary Decree for the Musselshell River, below Roundup (Basin 40C). Each of these claims received an issue remark. Issue remarks result from Department of Natural Resources and Conservation ("DNRC") claims examination or by

Water Court order. Claims examination confirms the historical use of water right claims and identifies issues with claims. If claims examination cannot confirm some aspect of a claim, an issue remark is added to the claim. These claims did not receive any objections or notices of intent to appear.

The Court consolidated these claims into Water Court Case 40C-0238-R-2022 on May 16, 2022. The consolidation order set a filing deadline by which Claimant was to file information resolving the issue remarks on each claim. The Court reset the filing deadline on October 13, 2022. Claimant filed responsive information on December 28, 2022.

FINDINGS OF FACT

1. 40C 186957-00 appeared with the following issue remarks:

THE CLAIMANT DID NOT IDENTIFY THE PERIOD OF DIVERSION FOR THIS RIGHT. A PERIOD OF DIVERSION HAS BEEN ADDED TO MATCH THE PERIOD OF USE. IF NO OBJECTIONS ARE RECEIVED TO THE PERIOD OF DIVERSION OR PERIOD OF USE, THOSE ELEMENTS WILL BE DECREED AS SHOWN ON THIS ABSTRACT AND THIS ISSUE REMARK WILL BE REMOVED FROM THIS CLAIM.

POINT OF DIVERSION AND RESERVOIR RECORD MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

THE PLACE OF USE APPEARS TO NEED MODIFICATION BASED ON THE DNRC CORRECTION TO THE POINT OF DIVERSION. THE CORRECT PLACE OF USE LEGAL LAND DESCRIPTION APPEARS TO BE THE NWNWSE SEC 20 TWP 11N RGE 30E MUSSELSHELL COUNTY.

2. Claimant states in the December 28, 2022 response that Claim 40C 186927-00 should be modified as described in the issue remark.

3. The place of use of Claim 40C 186927-00 should be described as NWNWSE of Section 20, T11N, R30E.

4. Claim 40C 209622-00 appeared with the following issue remark:

THE CLAIMED FLOW RATE MAY BE QUESTIONABLE.
DOCUMENTATION SUBMITTED WITH THIS CLAIM INDICATES A
FLOW RATE OF 1.25 CFS.

5. Claimant states in the December 28, 2022 response that it “agrees to the current flow rate of 2.67 CFS. Claimant no longer has or can find the supporting documentation.”

6. Claim 40C 209622-00 is for an irrigation right based on a filed notice of appropriation. The priority date claimed is August 17, 1883. The claimed flow rate is 2.67 CFS. The filed notice of appropriation on which the claim is based was filed by C.W. Sanders. The filing “I shall have a valid right to 50 inches of the [waters] in Fattock’s Creek a tributary of the Musselshell River.”

7. During the DNRC’s initial review of this claim on April 9, 1984, the flow rate element was noted as “over claimed.”

8. 50 miner’s inches of water converts to 1.25 CFS.

9. There is no evidence in the claim file supporting a historical (pre- July 1, 1973) flow rate of 2.67 CFS.

10. The flow rate of Claim 40C 209622-00 should be described as 1.25 CFS.

11. Claim 40C 209633-00 appeared with the following issue remark:

FOR CONSISTENCY PURPOSES THE LEGAL DESCRIPTION FOR POINT OF DIVERSION #1 FOR THE KRUEGER-SPENDIFF DITCH SHOULD BE GOV'T LOT 3, W2, SEC. 1, 8N 27E, MUSSELHELL COUNTY. THIS LEGAL DESCRIPTION WAS ESTABLISHED IN THE MASTER'S REPORT DATED 12/14/1992 AND CAN BE VIEWED IN CLAIM 40C 205073-00.

12. Claimant agrees with the proposed modification to the point of diversion of Claim 40C 209633-00.

13. Point of Diversion No. 1 of Claim 40C 209633-00 should be described as Government lot 3, W2, Section 1, T8N, R27E.

14. Claim 40C 210345-00 appeared with the following issue remark:

FILING FEE INSUFFICIENT TO COVER CLAIM. TOTAL AMOUNT
DUE 40.00

15. Claimant included in the December 28, 2022 response a receipt for a fee payment to the DNRC. Claimant paid \$ 40.00, minus a surcharge, to the DNRC.

16. The issue remarks on all above-captioned claims should be removed.

APPLICABLE LAW

1. A properly filed statement of claim is prima facie proof of its content. Section 85-2-227, MCA. The prima facie status of a claim may be overcome by a preponderance of the evidence. Section 85-2-227, MCA; Rule 19, W.R.Adj.R. A preponderance of the evidence is evidence that shows a fact is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

2. The Water Court must weigh an issue remark, and the information resulting in that issue remark, against the claimed water right. Section 85-2-247(2), MCA.

3. The Water Court must resolve all issue remarks not resolved through the objection process. Section 85-2-248, MCA. The Court must review information in the claim file or obtained by the Court to determine if there is a sufficient basis to resolve the remarks. 85-2-248(3), MCA.

CONCLUSIONS OF LAW

1. The changes described in the Findings of Fact may be made because the evidence in the record overcomes the prima facie status of each claim by a preponderance of the evidence.

2. The changes described in the Findings of Fact and the evidence in the record provide the Court with a sufficient basis to resolve and remove the issue remarks on each above-captioned claim.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. Post-decree Abstracts of Water Right Claims are served with this Report to confirm the recommended changes have been made in the state’s centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail:

Kite Cattle Co.
664 Fattig Creek Rd
Roundup, MT 59072

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MUSSELSHELL RIVER, BELOW ROUNDUP
BASIN 40C

Water Right Number: 40C 186957-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: KITE CATTLE CO
664 FATTIG CREEK RD
ROUNDUP, MT 59072 6424

Priority Date: JULY 1, 1963

Type of Historical Right: USE

Purpose (use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: UNNAMED TRIBUTARY OF NORTH WILLOW CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NWNWSE	20	11N	30E	MUSSELSHELL

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DAM

Reservoir: ONSTREAM **Reservoir Name:** RAGGED POINT RESERVOIR

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	NWNWSE	20	11N	30E	MUSSELSHELL

Diversion to Reservoir: DIVERSION # 1

Dam Height: 20.00 FEET

Depth: 17.00 FEET

Surface Area: 9.00 ACRES

Capacity: 61.20 ACRE-FEET

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			NWNWSE	20	11N	30E	MUSSELSHELL

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MUSSELSHELL RIVER, BELOW ROUNDUP
BASIN 40C

Water Right Number: 40C 209622-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: KITE CATTLE CO
664 FATTIG CREEK RD
ROUNDUP, MT 59072 6424

Priority Date: AUGUST 17, 1883

Type of Historical Right: FILED

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER

Flow Rate: 1.25 CFS

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 1 - HIGH

Maximum Acres: 80.00

Source Name: FATTIG CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NWNESE	29	8N	28E	MUSSELSHELL

Period of Diversion: APRIL 15 TO OCTOBER 15

Diversion Means: PUMP

Period of Use: APRIL 15 TO OCTOBER 15

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	26.00		SWNE	29	8N	28E	MUSSELSHELL
2	18.00		E2SENW	29	8N	28E	MUSSELSHELL
3	36.00		W2SE	29	8N	28E	MUSSELSHELL

Total: 80.00

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

209622-00

209623-00

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MUSSELSHELL RIVER, BELOW ROUNDUP
BASIN 40C

Water Right Number: 40C 209633-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: KITE CATTLE CO
664 FATTIG CREEK RD
ROUNDUP, MT 59072 6424

Priority Date: MAY 31, 1904

Type of Historical Right: FILED

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 3.09 CFS

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 1 - HIGH

Maximum Acres: 145.20

Source Name: MUSSELSHELL RIVER

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	3	W2	1	8N	27E	MUSSELSHELL

Period of Diversion: APRIL 15 TO OCTOBER 15

Diversion Means: HEADGATE

Ditch Name: KRUEGER-SPENDIFF DITCH

2		SWNWNE	32	9N	28E	MUSSELSHELL
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Period of Diversion: APRIL 15 TO OCTOBER 19

Diversion Means: PUMP

3		SENWNW	32	9N	28E	MUSSELSHELL
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Period of Diversion: APRIL 15 TO OCTOBER 19

Diversion Means: PUMP

Period of Use: APRIL 15 TO OCTOBER 15

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	6.00		NWNWNW	33	9N	28E	MUSSELSHELL
2	75.50		N2	32	9N	28E	MUSSELSHELL

Total: 81.50

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

202091-00

202092-00

209633-00

209634-00

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MUSSELSHELL RIVER, BELOW ROUNDUP
BASIN 40C

Water Right Number: 40C 210345-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: KITE CATTLE CO
664 FATTIG CREEK RD
ROUNDUP, MT 59072 6424

Priority Date: JUNE 20, 1953

Type of Historical Right: USE

Purpose (use): DOMESTIC

Flow Rate: 7.00 GPM

Volume: 2.00 AC-FT

Households: 1

Maximum Acres: 0.50

Source Name: GROUNDWATER

Source Type: GROUNDWATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SENE	32	9N	28E	MUSSELSHELL

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: WELL

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	0.50		SENE	32	9N	28E	MUSSELSHELL

Total: 0.50